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In The

Supreme Court of the United States

October Term, 1982

KATHY RIVINIUS and RONALD WEIKUM,

Petitioners,

vs.

STATE OF NORTH DAKOTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
SUPREME COURT OF THE STATE OF NORTH DAKOTA

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QUESTIONS PRESENTED

(1) Is North Dakota's Compulsory School Attendance Law, as Applied To Petitioners, An Unconstitutional Violation Of Their Rights To Worship Freely And Direct The Upbringing Of Their Children As Guaranteed By The First and Ninth Amendments To The United States Constitution And/Or Article I, Section 3 Of The North Dakota Constitution?

(2) In The Face Of Free Exercise Of Religion And Parental Rights Challenges To A State's Compulsory School Attendance Regulatory Scheme, Is The State's Compelling Interest In Its Own Selected Processes For Educating, Or Is The Interest That The Child Is Being Educated?

(3) In The Face of Direct Infringement Upon Free Exercise Of Religion And Parental Rights, May A State Effectively Serve Any Compelling Interest In Education By Other Means Than Directly Regulating An Educational Process That Is Integrally And Inseparably Religious?

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KATHY RIVINIUS and RONALD WEIKUM,

Petitioners,

vs.

STATE OF NORTH DAKOTA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF NORTH DAKOTA

The petitioners, Kathy Rivinius and Ronald Weikum, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Dakota made in this proceeding on December 17, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Dakota in *State of North Dakota v. Kathy Rivinius and Ronald Weikum,* is as yet unreported, but is printed

in Appendix A, hereto, at App. 1, *infra*. The memorandum decision on appeal of the South Central Judicial District Court is unreported, but is printed in Appendix B hereto, *infra*, at App. 27. The memorandum opinion of the Sioux County Justice Court is unreported, but is printed, *infra*, in Appendix C hereto, at App. 32.

JURISDICTION

The judgment of the Supreme Court of the State of North Dakota was made on December 17, 1982, and this petition for certiorari is timely filed. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3) in that the validity of a state statute is drawn into question as being, in its application, repugnant to the free exercise of religion and of parental rights as guaranteed by the First and Ninth Amendments to the Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the North Dakota Constitution, the United States Constitution, and the North Dakota Century Code are involved in the questions presented:

UNITED STATES CONSTITUTION

U. S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U. S. Const. amend. IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U. S. Const. amend. XIV § 1:

. . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NORTH DAKOTA CONSTITUTION

N. D. Const. art. I, § 3:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N. D. Const. art. VIII, §§ 1, 2, 3, and 4:

Section 1. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the State of North Dakota and free from sectarian con-

trol. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

Section 3. In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.

Section 4. The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in courses of study, and to promote industrial, scientific, and agricultural improvements.

NORTH DAKOTA CENTURY CODE

N. D. Cent. Code § 15-34.1-01:

Every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years who does not fall under the provisions of sections 15-34.1-02-04 or 15-34.1-03, shall send or take such child to a public school each year during the entire time such school is in session.

N. D. Cent. Code § 15-34.1-05:

Any person failing to comply with the requirements of this chapter is guilty of an infraction.

N. D. Cent. Code § 15-34.1-03(1):

> The parent, guardian, or other person having control of a child required to attend school by the provisions of this chapter shall be excused by the school board from causing the child to attend school whenever it shall be shown to the satisfaction of the board, subject to appeal as provided by law, that one of the following reasons exists:
>
> 1. That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the State of North Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

This case also presents questions with regard to teacher certification requirements of Chapter 15-36 and section 15-41-25 of the North Dakota Century Code. The pertinent text of these statutes are set forth verbatim in Appendix D hereto, *infra*, at App. 36.

STATEMENT OF THE CASE

Petitioners Kathy Rivinius and Ronald Weikum were Defendants in a criminal justice action before the Sioux County Justice Court. Both petitioners were charged with violation of N. D. Cent. Code § 15-34.1-01 for sending their children, without excuse from the school board, to Living Word Academy, a Christian day school that is not

approved by the County Superintendent of Schools and the Superintendent of Public Instruction of North Dakota as required by N. D. Cent. Code § 15-34.1-03(1).

A joint trial of petitioners was held before the Court on September 9, 1981. In its memorandum opinion, the Court declared that:

> [i]n response to the state's showing, the defendants assert that the North Dakota Compulsory school attendance law as applied to them, is a constitutionally impermissive burden on their free exercise of religion, contrary to the First Amendment to the United States Constitution. Although the Court is sympathetic to defendants' well-presented case, it finds the defendants guilty. . . . See App. A, *infra*, at App. 1.

Each petitioner was fined $10.00.

The petitioners appealed that judgment in a trial *de novo* before the South Central Judicial District Court, Grant County, North Dakota. The Court, in its Memorandum Decision on Appeal found that

> the evidence establishes violation of 15-34.1-01 by evidence beyond a reasonable doubt. . . . However, Defendants do challenge the constitutionality of 15-34.1-01 claiming that as applied to them it violates their right to the free exercise of religion contrary to the First Amendment of the U. S. Constitution.
>
> • • •
>
> The Court finds Defendants guilty as charged and imposed punishment identical to that imposed in justice court. The Defendants do not intend to be lawbreakers and this case is only a means of asserting their constitutional rights. See App. B, *infra*, at App. 30.

The petitioners appealed that judgment to the North Dakota Supreme Court. In the Brief of Appellants, pe-

titioners raised their constitutional questions in the "Statement of Issues:"

II.

The Trial Court Erred In Failing To Determine That The North Dakota School Laws And Regulations, As Applied To Appellants, Violate Their Right To The Free Exercise Of Religion And To Educate Their Children As Guaranteed By The North Dakota And United States Constitutions.

A. The Trial Court failed to determine that appellants' religious/parental belief that they must educate their children from a Biblical viewpoint without state interference is a sincerely held belief.

B. The Trial Court failed to determine that appellants' parental right to educate their children and their right to free exercise of religion is unduly burdened by the regulations as applied to appellants.

C. The state did not prove that it had an overriding interest in NDCC 25-34.1-03 that cannot be met by a less drastic alternative means.

The North Dakota Supreme Court summarized the religious beliefs of petitioners in its statement of facts of its decision. (See App. A, at App. 1). The Court accepted that the belief of the petitioners that "they are commanded by God to send their children to teachers who have not submitted themselves to the state certification process and to a school which has not submitted to the approval process required by the compulsory education laws" was a sincerely held belief that was religiously based. (See App. A, at App. 1).

In continuing its First Amendment analysis, the Court held that the petitioners had demonstrated that compli-

ance with the compulsory education law was prohibited by their religious beliefs, (App. A, at App. 1), but that the state's interest in education balances those beliefs (App. A, at App. 1), and the suggested alternative to direct regulation, submission of standardized achievement test scores, would not satisfy the state's interest (App. A, at App. 1). It is from this ruling that petitioners pray a writ of certiorari issue.

REASONS FOR GRANTING WRIT

A. The Decision Below Recognized That North Dakota Statutes Infringed Upon Free Exercise Of Religious And Parental Rights Guaranteed By The First Amendment To The U. S. Constitution And By Article I, Section 4 Of The North Dakota Constitution, But That Fact Notwithstanding, Imposed Criminal Sanctions For The Exercise Of That Right.

The affirmance by the North Dakota Supreme Court of the lower courts' convictions of petitioners for attempting to exercise their religious convictions is abhorrent to the very principles for which the religion clauses of the First Amendment were added to the Constitution of the United States. It is also contrary to the principles guaranteed by the North Dakota Constitution's Declaration of Rights. It is perhaps more abhorrent because all three lower courts recognized and respected the petitioners' sincerely held religious beliefs. They each agreed that the conduct for which the petitioners were being penalized was based upon deeply held religious convictions. Albeit reluctantly, they each nevertheless penalized petitioners for exercising those religious convictions.

That the values enshrined in the First Amendment "plainly rank high 'in the scale of our national values' " is a principle well and long-settled. *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490, 501, 99 S. Ct. 1313, 59 L. Ed. 2d 553, 544 (1979). But "[n]o provision of the Constitution is more closely tied to a given content by its generating history than the religion clause of the First Amendment." *Everson v. Board of Education,* 330 U. S. 1, 33, 67 S. Ct. 504, 91 L. Ed. 711 (1947). No more succinct summary of that history and the impetus surrounding the religious clause can be found than that in the dissenting opinion by four justices to this Court's *Everson* decision.

> For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general.
>
> • • •
>
> Madison was certain in his own mind that under the Constitution "there is not a shadow of right in the general government to intermeddle with religion" and that "this subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it." *Id.,* at 34 and 38.

At the date of the *Everson* decision, the dissenting justices found that the only one serious remaining threat "to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through the use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function." *Id.,* at 44. According to the dissent, such an exercise was impermissible because

> daily religious education commingled with secular is "religious within the guarantee's comprehensive

> scope." So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching, but by its essential nature regardless of its details. *Id.*, at 33.

This Court's later decision, *Lemon v. Kurtzman*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) affirmed the concepts discussed by the four dissenting justices in *Everson* when it held that the government is to be "entirely excluded from the area of religious instruction." *Lemon, supra*, at 625.

Therefore the amendment, said the *Everson* dissent, secured all forms of religious expression, including religious teaching, except "conduct which trenches upon the freedom of others or clearly and presently endangers the community's good order and security." In its own footnote the dissent explained that the concept of clear and present danger was from Jefferson himself, when he declared in the Virginia Statute for establishing religious freedom: "That it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." This principle has also been affirmed by this Court in its other decision. E. g., *Schneider v. Irvington* 308 U. S. 147, 164, 60 S. Ct. 146, 84 L. Ed. 155 (1939); *Sherbert v. Verner*, 374 U. S. 398, 407-409, 82 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

This case presents to this Court for its attention a new "serious threat" to the guarantees of the Religious Clauses of the First Amendment, a threat which is in direct contravention to the principles of the United States and North Dakota Constitutions and to the decision of

Wisconsin v. Yoder, 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). The threat in *Everson* was that religion would intrude into matters of state. The threat here is that the state is intruding into matters of religion. While the state is traditionally quick to prohibit intrusion into its powers, it is not so hasty to limit its own interference into matters that the Court has declared is none of its business.

These petitioners need the assistance of this Court. These two petitioners are pleading not only for their own religious liberties against the wealth and the power of the State of North Dakota. The stand they have taken against government intrusion into the religious education of their children is a fight that is being more and more frequently waged in state after state. They have been told by their state, in essence, under threat imposition of criminal sanction, to perform acts admittedly at odds with fundamental tenets of their religious beliefs. The lower court recognizes that the children of these parents are performing admirably in the religious educational system in which they have been enrolled. Therefore, though petitioner's conduct posed no clear and present danger that their child's well-being, or that of society, is in any way threatened, the court insisted upon imposing prior restraints upon petitioners' conduct because it is "an acceptable method of satisfying part of the constitutional mandate to the legislature to properly provide an education for its youth." In a case involving beliefs that are admittedly religious and sincere, merely being "an acceptable method" of accomplishing a state's goals is not enough. There must be no other less drastic alternative method by which those goals may be satisfied.

The protection of a man's religious beliefs is probably the paramount and fundamental obligation of government. While the freedoms of speech and of the press and of assembly are essential to the quality of the temporal life of America's citizens, the freedom from interference into religious right goes not only to that quality, but also to the eternal state of a believer's soul. These petitioners seek to protect the very lifeblood of their religion—their children. Like the parents in *Yoder,* these petitioners seek to educate their children in the doctrines of their faith so that that faith might continue. The Court below says the suggested alternative to direct interference into the religious belief might possibly be too late to prevent the child from wasting a term, a semester, or a year. These parents are convinced that to submit the religious training of their children to the authority the state attempts to assume would demonstrate objectively to the children that the religious beliefs are not sincere. Implicit in the state's requirement is the idea that the children may not understand now, but they will understand in the future what their parents really believed. Petitioners are trying to now teach their children that they must exercise their beliefs by their objective actions. They must live now what they believe. The state's prohibition goes to the very heart of this education. It does not allow the parents to act what they believe.

The Court found in *Yoder* that the laws impacted the religious tenets and *practices* of the Amish faith. The Court determined that the impact of the compulsory attendance law on the *practice* of the Amish religion was severe and inescapable. The impact was evident from both as subjective, and an objective point of view. Forc-

ing them to perform acts undeniably at odds with important religious tenets was a grave interference with those tenets from a subjective point of view. It also carried with it the kind of objective danger that the First Amendment was designed to prevent. Like the Yoders, these petitioners must either abandon their belief and conform to the majoritarian standards of education, continue to practice their faith and face repeated imposition of criminal sanctions, or be forced to migrate to some other and more tolerant region. *Yoder, supra* at 218. The intent of the First Amendment was to prevent the imposition of that set of alternatives. This case is important to carry out that intent.

B. This Decision Is In Conflict With Other State Jurisdictions And With Decisions Of This Court.

This Court recognized in *Yoder* that changes in circumstances and the state of affairs sometimes bring into play new tensions and conflicts between long held religious beliefs and the new circumstances. The Court surveyed the long, and deeply religious history of the Old Order Amish. For nearly three centuries, the Amish had demonstrated, in a very objective manner, that religion "pervades and determines their entire way of life." *Id.*, at 216. Until "great changes in education" came about, the Old Order Amish beliefs were not threatened by the state's requirement that their children be compelled to attend a public school.

> So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school at-

> tendance would expose their children to the worldly influence they reject. But the modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. *Id.*, at 217.

This Court, then, determined that these recent changes in the processes of education did indeed infringe upon the sincerely held Amish beliefs that could be traced back some three hundred years. Despite the fact that the Amish objection to the compulsory attendance requirement beyond the elementary level was a relatively recent objection, it was not because of a recently acquired religious belief, but because of changes in the circumstances surrounding that belief. The Court said that it could

> not be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life. *Id.*, at 218.

The Yoders, members of the Old Amish faith, simply could not submit to the changes in compulsory attendance law of Wisconsin which had come into conflict with their faith.

The petitioners face similar changes in the field of education which have come into conflict with what the record demonstrated to be a long history of their fundamentalist religious faith. Expert witness, Dr. Rousas Rushdoony, testified at some length that from the days of the Caesars in ancient Rome, the church had been seeking to give their children a religious education without interference by the Caesars.

Recent decisions by this Court which, among other things, prohibited prayer and Bible reading in the public schools, and which, to comply with the establishment clause of the First Amendment, mandated that instruction at public schools be given from a religiously neutral point of view, have raised new tensions with fundamentalist religious believers, such as the petitioners, across the country. The petitioners believe that there can be no education separate from religion. Since that kind of religious education could no longer be obtained through the public school systems, many religious school systems have been established throughout the country. Dr. Raymond Moore, Chief Executive Officer of the Hewitt Research Foundation and consultant to the National Education Association, testified that this church school movement grew some 134 percent in the previous ten to fifteen years and was composed of conservative denominations which considered their religious schools to be a very integral part of their church program. (District Court transcript, pp. 41-42). Thus have been raised the new tensions between faith and state.

> Government regulation of private religious schools has been the center of the most recent set of tremors and earthquakes in the nation's educational system. Using compulsory education, curriculum, and teacher certification requirements, states have sought to regulate and control the education given in nonpublic schools over the religious objections of those concerned. Binder, *Douglas v. Faith Baptist Church Under Constitutional Scrutiny*, 61 Neb. L. Rev. 74, 79 (1982). (Footnotes omitted).

In the case herein, North Dakota seeks to regulate this religious school through the state's teacher certification and school approval processes. However, North Da-

kota Superintendent of Public Instruction, Dr. Joseph Crawford, testified that since certification and approval do not guarantee quality education, the state's interest in education, at least with regard to nonpublic non-tax supported schools, could be met if these parents would submit to the state their child's standardized achievement test results to demonstrate that the child had learned. The North Dakota Supreme Court, Dr. Crawford's testimony notwithstanding, held that the teacher certification and school approval requirements were acceptable methods of assuring the state's interest, and that despite the fact that they conflict with petitioners' religious beliefs, they would be applied to Living Word Academy so that the parents were guilty of violating the compulsory attendance statute.

The state courts which have been presented with issues which are similar to these, have split over their decisions. Some have agreed with Dr. Crawford that the state's interest in education can be served without compliance with state regulations. (E. g., *Kentucky State Board, et al. v. Rudasill*, 589 S. W. 2d 877 (Ky. 1979), *cert. denied*, 446 U. S. 938 (1980); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N. E. 2d 750 (1976); *State v. LaBarge*, 134 Vt. 276, 357 A. 2d 121 (1976); *State v. Massa*, 95 N. J. Super. 382, 231 A. 2d 252 [Morris County Ct. 1967].)

Other courts, such as the case herein, have determined that the state's interest in education may only be served by the state's own selected processes for educating, such as teacher certification and school approval. (See *State v. Riddle*, 285 S. E. 2d 359 (W. Va. 1981); *State v. Shaver*, 294 N. W. 2d 883 (N. D. 1980); *Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N. W. 2d 571 (1981), *dismissed*, 454 U. S. 803 [1981].)

The decision of *Wisconsin v. Yoder, supra,* has left confusion in the states over just what is the state's interest in education. Is it the process of education? In other words, is the state's interest in instruments which are used to produce learning - textbooks, number of educational days, the facilities, equipment, educational background of teachers? Or is it the state's interest that the child is being educated, is learning what is being taught? The *Yoder* decision accepted the state's claim that its interest lay in preparing "citizens to participate effectively in our open political system" and preparing "individuals to be self-reliant and self-sufficient participants in society." *Yoder,* at 221. The decision did not mandate a process by which those two goals could be accomplished.

The North Dakota Supreme Court quoted at length from the state's constitution as the state's interest that mandates "a high degree of intelligence, patriotism, integrity and morality on the part of every voter (VIII § 1), impressing upon the mind the importance of truthfulness, temperance, purity, public spirit and respect for honest labor (VIII § 3) and the prevention of illiteracy. The state has ably provided for these requirements in its system of free public schools mandated by those constitutional provisions. But that Constitution also recognizes that schools other than the free public schools may reach those same goals when it shifts from the use of "public schools" to the use of "all schools." None of these provisions, however, indicate an interest in the process by which illiteracy is prevented. They all look to an end product—an educated citizen, one who has a high degree of intelligence, patriotism and integrity.

It must be recalled that it is a religious education which is being provided to these children. Living Word

Academy receives no public funds. The State of North Dakota is attempting to regulate this religious education with what might be labeled neutral standards. However, as this Court has determined,

> a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Yoder, supra,* at 220; *Thomas v. Review Board,* 450 U. S. 707, 717, 101 S. Ct. 1425, 67 L. Ed. 2d 624, 633 (1981).

Any interference by the state into the affairs of this religious education conflicts with the line of decisions from this Court which has denied to the state the power to have any contact with religious schools which are "an integral part of the religious mission" of their sponsors (*Lemon v. Kurtzman,* 403 U. S. 602, 616 [1971]), that mission being "the only reason for the schools' existence" (*Meek v. Pittenger,* 421 U. S. 349, 366 [1975]); whose "affirmative, if not dominant, policy is to assure further adherents to a particular faith by having control of their education at an early age." (*Tilton v. Richardson,* 403 U. S. 672, 685-686 [1971]); whose teachers advance the religious mission of the religious schools which they serve (*Public Funds For Public Schools v. Marburger,* 358 F. Supp. 29, 40-41, *aff'd* 417 U. S. 961 [1974]); whose technical training goes hand in hand with the religious mission," so that, within the religious school, "the two are inextricably intertwined." *Meek, supra,* at 366.

The petitioners demonstrated to the state that their children are learning at Living Word Academy. They are willing to continue to demonstrate that fact to the State of North Dakota. They contend that the state's interest in the education of their children will be met by

this method which is a less drastic infringement upon their rights to freely exercise their religious faith and to educate and raise their own children. They do not wish to move to Kentucky, where those constitutional rights have been protected by allowing parents to demonstrate the state's interest by submitting test results. *Rudasill, supra.* Neither are they ready to immigrate to New Jersey, where a parent, uncertificated by the state, is allowed to give her child an equivalent education as demonstrated by standard achievement test scores, *Massa, supra;* or to Ohio, where the "minimum standards" for the operation of non-public schools have been held to be a violation of the free exercise of religion, *Whisner, supra.* Neither do they want to be considered law breakers for continuing to practice their faith in North Dakota. They cannot, in good conscience before God, recant their religious convictions which dictate that they give their children a religious education free from control by the state.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of North Dakota.

Respectfully submitted,

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